Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

	)	
Presubscribed Interexchange Carrier Charges	)	CC Docket No. 02-53
	)	CCB/CPD File No. 01-12
	)	RM-10131

<u>AT&T COMMENTS</u>

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") submits these comments in response to the <u>NPRM</u> in this proceeding regarding the Commission's regulation of presubscribed interexchange carrier ("PIC") change charges assessed by incumbent local exchange carriers ("ILECs").[1]

In initiating this proceeding, the Commission found that the $5.00 "safe harbor" for PIC change rates, adopted at the inception of the access charge regime and at a time when the presubscription process had barely commenced, must be reexamined in light of the sea changes in the telecommunications marketplace that have occurred in nearly two decades following the introduction of equal access.[2] As the Commission

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1 <u>Presubscribed Interexchange Carrier Charges</u>, CC Docket No. 02-53, CCB/CPD File No. 01-12, and RM-10131, Order and Notice of Proposed Rulemaking, released March 20, 2002 ("Order" and "NPRM"), 67 FR 34665 (May 15, 2002).

2 <u>Order</u>, ¶ 8, <u>citing</u> <u>Investigation of Access and Divestiture Related Tariffs</u>, CC Docket No. 83-1145, Phase I, released April 27, 1984 ("1984 Access Tariff Order").

recognized there, the safe harbor rate was adopted in the absence of any reliable information regarding the ILECs' then-current costs or methodologies for implementing PIC changes, and was based on a policy of discouraging "excessive" carrier changes by presubscribed customers.[3] Whatever limited justification may have existed for its adoption at that time, the safe harbor PIC change rate is an anachronistic relic of the immediate post-divestiture period that has become entirely insupportable in current circumstances. As the NPRM points out (¶ 12), the Commission "relies on the fiercely competitive nature of the long distance market to ensure reasonable prices for consumers," and "[t]he ability of end users to change carriers easily and for any reasons gives long distance carriers an incentive to provide their services at reasonable rates." Imposing a non-cost based transaction fee such as the current safe harbor PIC change charge that may inhibit consumers from exercising their marketplace options can no longer be reconciled with the Commission's longstanding pro-competitive policies and the objectives of the Telecommunications Act of 1996

The NPRM requests comment in two principal areas "with the goal of establishing a reasonable PIC change charge under current conditions."[4] First, the Commission seeks information regarding the actual costs of implementing PIC changes, using current technology.[5] Additionally, the Commission seeks comment

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3 Id.

4 Id., ¶ 14.

5 Although the NPRM (¶¶ 14-5) also requests comment on whether market forces can be relied upon to ensure the reasonableness of PIC change charges, it is abundantly clear that there is not now (and will not be for the foreseeable

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(¶ 18) on whether it should establish a new safe harbor level for PIC change charges, or should instead rely on review of the cost support for ILEC tariff filings or other regulatory mechanisms to ensure reasonable rates for PIC changes.

Cost information. As the NPRM implicitly recognizes, provision of detailed information regarding the costs of implementing PIC changes is the responsibility of the ILECs that have exclusive access to those data, and that seek to impose PIC change charges on their end users (and, derivatively, on long distance carriers that elect to defray or absorb those charges as part of their efforts to attract new customers). In the proceedings on the Competitive Telecommunications Association

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future) any competition that can operate effectively to discipline the levels of those rates. As the NPRM (¶ 15) correctly recognizes, although a PIC change relates to a customer-carrier relationship between the end user and that subscriber's chosen long distance carrier, the PIC change is implemented by reprogramming a LEC switch to recognize the Carrier Identification Code ("CIC") of the end user's presubscribed long distance carrier.

Accordingly, despite the rivalrous competition that already characterizes the long distance market, each LEC controls the PIC change charge level for all its local exchange customers. Competition in local markets is only now beginning to emerge, and LECs do not actively compete with each other with respect to their rate levels for implementing PIC changes. Moreover, the alternative of "[m]odifying [current] network configurations" for effectuating PIC changes (NPRM, ¶ 15), while not clearly defined, would obviously entail enormous industry-wide costs and lengthy implementation delay. There is thus compelling support for application here of the Commission's maxim that "Where a market is not competitive we cannot rely on market forces to constrain rates" (id., citing Access Charge Reform, 16 FCC Rcd 9923, 9948 (2001)(¶ 43).

("CompTel") rulemaking petition leading up to the initiation of this proceeding,[6] the ILECs attempted to discharge this burden with rhetoric rather than record evidence. For example, in their oppositions to the CompTel Petition, some ILECs asserted without any support that their current actual costs of implementing PIC changes greatly exceed the current safe harbor level.[7] That claim was already threadbare, however, in light of the Commission's previous finding in the MCI Complaint Order[8] -- entered after providing the ILEC defendants a full opportunity to develop a record -- that those carriers "have, in fact, realized substantial cost savings from the automation of their PIC-change processes over the past fifteen years."

Provision of detailed cost support by the ILECs is particularly important here because, as the Commission points out (Order, ¶ 8), "[t]he PIC-change charge is not included in, and is therefore not constrained by, LEC price cap regulation."[9] Moreover, for the reasons shown above, marketplace forces can provide no effective

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6 See CompTel Files Petition for Rulemaking Re: Presubscribed Interexchange Carrier Charges, RM No. 10131, CCB/CPD File No. 01-12, Public Notice, 16 FCC Rcd 11085 (2001)("CompTel Petition").

7 The NPRM (¶ 11) recognized the facial implausibility of that assertion, given that in the past 15 years not a single ILEC has attempted to avail itself of the opportunity provided by the 1984 Access Tariff Order to justify a tariffed PIC change rate above the safe harbor limit.

8 MCI Telecommunications Corp. v. U S WEST Communications, Inc., File Nos. E-97-08, E-97-20 through 24, 15 FCC Rcd 9328 (2000) ("MCI Complaint Order").

9 When the Commission adopted price cap regulation of the major ILECs, it excluded the PIC change charge from the application of the caps. See Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6810 (1990), recon. 6 FCC Rcd 2637, 2715 (1991). The Commission held that PIC

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discipline on the levels of the PIC change rates. And, unlike other charges in their federal access tariffs that are assessed by ILECs directly on carriers, PIC change charges are typically assessed in the first instance on end user customers, including tens of millions of residential and small business subscribers. The Commission's longstanding concern for maintaining reasonable rates for this segment of telecommunications users militates especially strongly for assuring that these consumers do not continue to be exposed to excessive charges for PIC changes.[10]

Section 61.38 of the Commission's Rules (47 C.F.R. § 61.38), governing the required support for non-price cap tariff filings, provides instructive guidance for the type and level of information that ILECs should provide for the Commission's de novo inquiry into the costs that may be recovered through a PIC change fee. Specifically, that rule requires that carriers submitting revised rates must

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change charges "continue to be regulated under a traditional approach" based on the cost of those services. See 6 FCC Rcd at 2716.

10 Cost-based PIC change charge levels are critical not only because of the economic burden that excessive rates impose on end users, but also because of their serious adverse competitive impact on telecommunications markets. As the record in the CompTel Petition bears out, long distance carriers may often reimburse or credit customers for PIC change charges as an inducement to switch carrier. Non-cost based PIC change charges thus necessarily have a dampening effect on vigorous competition among carriers by increasing unnecessarily the costs that long distance carriers bear when marketing to end users. See, e.g., AT&T Comments on CompTel Petition, p. 4; AT&T Reply Comments in id., p. 2 (citing other commenters' filings). Moreover, the non-cost based charges provide an additional, and wholly unjustifiable, subsidy from long distance carriers to ILECs that increasingly are becoming their direct competitors in established toll markets, as well as in emerging competitive local services.

supply "[a] cost of service study for all elements for the most recent 12 month period," together with a "complete explanation of the bases for [] estimates" used in the cost support.[11] As the NPRM (¶¶ 16-17) also recognizes, determining a cost-based PIC change charge will necessarily entail identifying individual work functions of implementing PIC changes and their associated expenses, as well as allocation of those functions between jurisdictions. ILECs should therefore be expected to submit to the Commission detailed justification for those claimed costs and jurisdictional allocations. Here again, Section 61.38of the Commission's Rules provides guidance about the content of those filing. Subsection (c)(1) of that regulation specifies that carriers submitting cost studies must also furnish the working papers underlying the cost data, with "a clear explanation of how the working papers relate to that information." Moreover, insofar as the ILECs may submit any statistical studies to support their claimed costs, Sections 1.383 and 61.38(c)(2) of the Commission's Rules further provide that such filings must "give a comprehensive delineation of the assumptions made, the study plan utilized and the procedures undertaken" in compiling that material. Without provision of such data (which is in the exclusive possession of ILECs), the Commission will lack the comprehensive record required to conclude that any current or proposed PIC change charges do not exceed a just and reasonable rate level in accordance the mandate of Section 201(b) of the Communications (47 U.S.C. § 201(b)).

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[11] 47 C.F.R. § 61.38(b)(1) and (b)(1)(i)(emphasis supplied).

Appropriate enforcement mechanisms. The NPRM (¶ 19) further requests comment on three alternative mechanisms for assuring that cost-based ILEC PIC change tariffs recover only the cost of that service: tariff filings with full cost support; reliance on formal complaints and other enforcement processes; and establishing a new safe harbor for PIC change charges. Only the first of these alternatives offers any viable means of ensuring that newly-filed PIC change charges are established and maintained at levels that reflect only the costs of those services.

The safe harbor mechanism for PIC change charges adopted in the infancy of the access charge regime has already seriously disserved rate payers because it has effectively immunized the ILECs' charges for this function from any downward revision (absent a Commission rulemaking such as the present proceeding), at the same time that changes in technology have dramatically reduced those carriers' costs of implementing carrier changes. As a technical legal matter, the safe harbor may not operate as a rate prescription under Section 205(a) of the Communications Act (47 U.S.C. § 205(a)) because, unlike a prescribed rate, rates within the safe harbor range are subject to revision by carrier-initiated tariff filings.[12] However, as the NPRM recognizes, the ILECs generally have had no economic incentive to displace rates at the upper limit of the safe harbor, because they could thereby continue to collect subsidies through those charges even though they realized substantial cost savings through changes in their PIC change process.

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12 Compare 47 U.S.C. § 205(a)(after rate is prescribed a carrier "shall not publish, demand or collect any charge other than the charge so prescribed) with Order,

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Section 208 of the Communications Act (47 U.S.C. § 208) also cannot provide any effective constraint on safe harbor rates, because the Commission found in the MCI Complaint Order that a formal complaint is not a proper venue for challenging the reasonableness of carrier charges once the Commission has established the safe harbor limit. Paradoxically, the safe harbor thereby provides the ILECs with protection even from prospective displacement of their PIC change charges that they would not enjoy for unsuspended streamlined tariffs deemed lawful under Section 204(a)(3) of the Communications Act, 47 U.S.C. § 204(a)(3).[13]

There is no conceivable policy basis for creating a safe harbor for PIC change charges that conveys this level of immunity from effective regulatory oversight over those charges. Indeed, any such mechanism is irreconcilable with the Commission's express goal in this proceeding "to establish a standard that does not

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¶ 11 (noting that ILECs could have filed cost-supported tariff changes for PIC changes, citing 1984 Access Tariff Order).

13 See Implementation of Section 402(b) of the Telecommunications Act of 1996, 12 FCC Rcd 2170 (1997), petition for review pending sub nom. AT&T Corp. v. FCC, No. 02-1084 (D.C. Cir, filed February 27, 2002). Even apart from the unwarranted protection the safe harbor provides in such proceedings, reliance on the formal complain process is insufficient to establish and preserve reasonable PIC change charge rates. Although the information necessary to determine whether a PIC change charge rate reflects no more than a ILEC's current costs is exclusively within that carrier's possession, the Commissions' formal complaint process contemplates that complainants will already have access to that information and provides only limited opportunity even for permissive discovery. See Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, 12 FCC Rcd 22,497 (1997); 47 C.F.R. § 1.729.

require continuous revision as technology evolves."[14] A safe harbor, necessarily based on current network arrangements, technologies and industry procedures (or on predictions of developments in the rapidly evolving telecommunications marketplace) is too inflexible to accomplish the NPRM's objective.

The inadequacy of this approach is underscored by the industry changes that occurred following the adoption of the current safe harbor level of $5.00 for PIC change charges. As the Commission noted in the MCI Complaint Order, by 1990 BellSouth had implemented a rate of $1.49 per transaction, which it claimed fully recovered that carrier's costs, and in 1995 Southern New England Telephone Company ("SNET") had reduced its PIC change charge to $2.30 "based on more efficient procedures" than those originally used by that carrier.[15] These substantial reductions in the rates of major ILECs at the same time that the $5.00 safe harbor remained in place and unexamined underscore the regulatory lag inherent in such a mechanism -- a result the Commission has recognized is fundamentally unsound:

> "As a general proposition, the state of regulation reflects established technology. Advances in technology often precede related changes in the applicable regulatory framework. This regulatory lag can sometimes lead to delay in the delivery to consumers of services that employ new technology, or new applications of existing technology that stretch or fall outside existing regulatory paradigms. . . . [B]reakthroughs in technology may eventually force modifications in regulatory structures, but the attendant delay in introducing such technology may be contrary to the public interest.".[16]

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14 NPRM, ¶ 16.

15 MCI Complaint Order. 15 FCC Rcd at 9332 (¶¶ 9-10). The 1995 reduction in the PIC change charge by SNET, now a unit of SBC Corporation, lays bare the mendacity of SBC's claim in this proceeding that the current actual costs of PIC changes greatly exceed the existing safe harbor level. Order, ¶ 10.

16 See 1998 Biennial Regulatory Review – Testing New Technology, 13 FCC Rcd 21,879 (1998).

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A safe harbor for PIC change rates, which deprives ratepayers of the benefits of any new, more efficient technology for implementing PIC changes, raises precisely the serious adverse consequences that the Commission has identified.

As AT&T has also recently demonstrated,[17] further increases in the efficiency with which many LECs implement PIC changes are readily possible. Specifically, under current voluntary industry arrangements many long distance carriers, major ILECs, and some competitive LECs ("CLECs") rely on the Customer Accounts Record Exchange ("CARE") process established by the industry Ordering and Billing Forum ("OBF") to inexpensively execute and confirm customer transfers from one carrier to another.[18] The CARE system was an outgrowth of the Bell System divestiture, through which the Bell Operating Companies ("BOCs") sought to provide service necessary to process subscription changes so that they could comply with their equal access obligations under the Modification of Final Judgment. However, because the CARE process is voluntary, many other ILECs have chosen not to adopt that mechanism, and CLECs frequently do not provide CARE at all, or do not provide it in

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[17] See AT&T Comments, filed May 10, 1992, in Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers, CC Docket No. 02-39 ("AT&T NOI Comments", pp. 39-43.

[18] The OBF was created by the Carrier Liaison Committee of the Alliance for Telecommunications Industry Solutions ("ATIS"), originally known as the Exchange Carrier Standards Association, to develop guidelines for

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a timely and reliable manner. Moreover, even LECs that participate in CARE do not do so in a uniform manner across the country, thereby impairing the efficiency of that process. As a result, there is no effective industry infrastructure in place to support the customer's ability to move seamlessly from one carrier to another.

A mandatory and uniform CARE system would address these concerns by ensuring that all service providers have timely and accurate information in connection with customer preferred carrier choices, changes and freezes. A mandatory CARE system would also require LECs that currently do not participate in CARE to implement carrier changes in a more efficient manner.[19] Further, as to LECs already participating in CARE, a mandatory obligation would impose a level of uniformity that would only enhance the quality and utility of the information used in connection with carrier changes.

Such a system would not be difficult to establish in a manner that minimizes LEC costs. For example, in conjunction with NeuStar, Inc., AT&T has developed and begun a CLEC CARE clearinghouse as one already-existing mechanism for implementing such a mandate. In light of the availability of this procedure, as well

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administering the equal access carrier selection process. OBF established voluntary industry CARE exchanges among carriers.

19 As AT&T also showed, a mandatory uniform CARE process would offer other important benefits by improving the accuracy of customer billing by carriers and avoiding inadvertent slamming or cramming of customers. These revisions to current industry arrangements will also mitigate but not eliminate the ILECs' incentives and ability to discriminate in favor of themselves and their affiliates to the detriment of long distance carriers and new local entrants. See AT&T NOI Comments, pp. 39-42.

as other potential ongoing improvements in future LEC productivity and efficiency in implementing PIC changes, adopting a safe harbor rate for that service cannot be justified.

Respectfully submitted,

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